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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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MAR 02 2010

FILE: EAC 07 155 51749 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is engaged in the sale and trade of motors, electronic and mechanical parts that seeks to employ the beneficiary as its sales manager. Therefore, the petitioner endeavors to extend the classification of the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In denying the petition, the director determined that the proffered position is not a specialty occupation and that a bona fide offer of employment did not exist.

On appeal, counsel contends that, contrary to the director's decision, the proffered position of sales manager is a specialty occupation position within the meaning of section 101(a)(15)(H)(i)(b) of the Act, and contends that the director's findings to the contrary were erroneous. No additional evidence is submitted in support of the appeal.

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed. Counsel's assertions on appeal about the proffered position satisfying specialty-occupation criteria are noted; but they merit no weight, as they are not supported by documentary evidence in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty

occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In a letter of support dated April 4, 2007, the petitioner indicated that the beneficiary would be employed in the position of sales manager for its company, which was established in March 2007 and claims to employ three persons. The petitioner described the position offered to the beneficiary as follows:

[The beneficiary] is being offered a temporary employment position of Sales Manager. Her position is one of the specialty occupations, which requires specialized knowledge as well as practical application of it. We require that the person must have at least a Bachelor Degree in Business and one year experience in marketing.

The duties and responsibilities for this position:

- Conducting business transactions with buyers
- Conducting market analysis in U.S. Market related to [the petitioner’s] products
- Conduct customer survey and services
- Advise the Group Headquarters regarding product feedbacks, sale, US market trends

Regarding the beneficiary’s qualifications, the petitioner stated that she holds both a bachelor’s and a master’s degree in business administration.

The director found the initial evidence insufficient to establish eligibility in this matter, and issued an RFE on May 1, 2007. Specifically, the director requested additional evidence demonstrating that a bona fide job offer for the proffered position existed, since the petitioner had only commenced operations the month prior to the filing of the petition. The director requested additional evidence pertaining to organizational structure and business operations of the petitioner’s company. In its letter of response to the RFE dated August 9, 2007, the petitioner claimed that the position was in

fact bona fide, and submitted a copy of an undated employment contract between the beneficiary and the petitioner outlining the terms of her employment. Also included was a copy of the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2007. This document, which covered the months of April, May, and June of 2007, demonstrated that contrary to the petitioner's claim to employ three persons, the beneficiary was the only person on its payroll during this time. The petitioner further claimed that a bachelor's degree is a common requirement for a sales manager position, and further claimed that since the petitioner is a subsidiary of a Chinese company recently established in the United States, the requirements for a sales manager position are unavoidably higher than the industry standard due to the company's market research requirements.

The petitioner also submitted a breakdown of the beneficiary's duties in a document entitled "Sales Manager Duty Allocation":

Market Analysis	50%
Conducting Business Transactions with Buyers	20%
Customer Survey and Service	20%
Communication with the Headquarters:	10%

The AAO notes that the August 9, 2007 letter neither explains nor is accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary will employ. The AAO also finds that the beneficiary's duties are so abstractly stated in the letter and supporting documents that they do not convey the specific nature of the work that he would actually perform and, therefore, do not indicate the nature and level of education that the work requires. In other words, based on the job description provided, it cannot be found that the proffered positions' duties would usually be associated with at least a bachelor's degree in a specific specialty.

As evident in the descriptions of the beneficiary's proposed work above, the petitioner describes the proffered position exclusively by generalized statements of broad functions. These statements do not convey whatever applications of highly specialized knowledge in a specific specialty the functions might entail when performed in the context of the petitioner's business. In addition, as noted by the director, the description incorporates duties traditionally assigned to market research analysts and/or market managers, not sales managers.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by USCIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See*

Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The 2006-07 edition of the *Handbook* describes the position of sales manager in relevant part as follows:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, promotions, marketing, sales, and public relations policies. (Executive vice presidents are included in the *Handbook* statement on top executives.) Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

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Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. (See the *Handbook* statement on sales representatives, wholesale and manufacturing.) Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

The director noted that, since 50% of the beneficiary's duties would be devoted to market analysis, it appears that the proffered position is more akin to that of a market analyst, not sales manager. However, the AAO notes that the position of sales manager is included under the general heading of "Advertising, Marketing, Promotions, Public Relations, and Sales Managers," and acknowledges that some marketing duties may be required in the category in which the proffered position is classified.

Under the same heading, the 2006-07 edition of the *Handbook* describes the position of market manager in relevant part as follows:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop

pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

Therefore, while the AAO notes the director's finding that 50% of the proposed duties include marketing analysis, these duties appear common in the classification of the proffered position. Nevertheless, even if the generic statements that comprise the information about the proffered position and its duties were sufficient to perfectly align the position with the broad occupational category of Advertising, Marketing, Promotions, Public Relations, and Sales Managers, this position has not been established as a specialty occupation.

Regarding the education requirements for entry into the position of sales manager, the 2006-2007 edition of the *Handbook* does not indicate that sales or marketing managers normally require at least a bachelor's degree in a specific specialty. The discussion in the "Training, Other Qualifications, and Advancement" section of this chapter provides:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Based on this discussion, it is apparent that employers of sales managers, or even marketing managers, do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. The fact that a degree in business administration is preferred does not equate to being a normal "requirement" for purposes of this analysis. As the *Handbook* indicates that entry into the sales manager or marketing manager occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, sales or marketing manager positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular sales manager position from qualifying as a specialty occupation under the criterion at 8 C.F.R.

§ 214.2(h)(4)(iii)(A)(I). However, it is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. This the petitioner has failed to do.

The AAO finds that the evidence of record does not indicate that the particular position before it is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that, as reflected in its earlier discussions about the examples of the petitioner's generalized descriptions of the duties of the proffered position, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a highly specialized level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proffered position from positions in the sales manager occupational category that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO now turns to a consideration of whether the petitioner may qualify its position under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. Therefore, the petitioner has failed to establish its position as a specialty occupation under the criterion's first prong.

With regard to the requirements of the second prong, the AAO finds nothing in the record to establish that the position is either so complex or unique that it can be performed only by a degreed individual. The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for sales manager positions, including degrees not in a

specific specialty related to sales and marketing. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner indicates that it was established in March 2007, one month prior to the filing of the instant petition. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

It must also be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. In this matter, the director found that based on the evidence submitted, a bona fide position of sales manager was not available to the beneficiary at the time of filing.

On appeal, counsel contends that the director's conclusion is erroneous, and focuses on the director's emphasis on the marketing duties of the beneficiary. This, however, was not the basis of the director's conclusions. Instead, the director found that a bona fide job position did not exist based on the fact that the beneficiary, as the petitioner's only worker on its payroll, could not possibly perform the stated duties of sales manager without additional staff to sufficiently operate the business.

As noted by the director, absent additional employees who would run the day-to-day operations of the company, such as answering phones and performing clerical and administrative tasks, the beneficiary could not possibly perform duties exclusive to those identified in the description of the sales manager position. In this case, the beneficiary would be expected to perform duties outside the scope of the claimed specialty occupation position, thereby further negating the claim that the proffered position was in fact a specialty occupation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective

evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Neither the petition nor counsel have provided evidence to show that an organizational structure exists within the petitioner's company which would allow the beneficiary to perform duties exclusive to the proffered position and not duties that are clerical, administrative, or secretarial. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, since the proffered position has not been deemed a specialty occupation on the basis of the lack of a degree requirement in a specific specialty, this issue need not be discussed further.

Therefore, for the reasons already discussed, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.